Nos. 83-997 and 83-1325

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRANS WORLD AIRLINES, INC., PETITIONER

v.

HAROLD H. THURSTON, ET AL.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, PETITIONER

v.

HAROLD H. THURSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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TABLE OF AUTHORITIES

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1. The Union, in its brief as respondent in No. 83-997, argues that this Court should not consider TWA's claim that the union is liable for damages

under the ADEA because EEOC and the private respondents have not cross-petitioned on that issue, and TWA has no right of contribution against the Union.[1]

a. This suit was brought by EEOC and the private respondents against both TWA and ALPA, seeking damages against them both. When the court of appeals reversed the district court's dismissal of that suit, it originally held that "appellants are entitled to recover back pay, an equitable remedy, against the union" (Pet. App. A34), and remanded the case to the district court with "directions to enter judgment for appellants against TWA and ALPA and to award to each plaintiff such amount as may be found due against each defendant in accordance with this opinion" (Pet. App. A35). On ALPA's petition for rehearing, the court of appeals amended this language (Pet. App. A38-A39), leaving TWA solely liable for all the damages found. This amendment clearly enhanced the consequences of TWA's liability beyond the exposure it had under the theory on which suit was originally brought and the original decision of the court of appeals. If TWA prevails in this Court, the district court on remand may apportion the total liability between ALPA and TWA; if TWA does not

[1] The petition for a writ of certiorari in No. 83-997 was granted on February 27, 1984; the cross petition (No. 83-1325) was not granted until April 2, 1984. In this unusual situation (see Sup. Ct. R. 22.4), the briefing schedule has been as follows: TWA filed its opening brief in No. 83-997 on May 17, 1984, and ALPA filed its opening brief in No. 83-1325 on May 31, 1984. We responded to these briefs in our main brief filed on July 6, 1984. On the same day, ALPA filed its main brief in response in No. 83-997, in which it for the first time presented its views on the union liability issue. Since we did not have the opportunity to address these views in our earlier filed brief, we do so here.

prevail, it is solely liable. As a practical matter, therefore, TWA has a significant financial interest in the question it has presented. This interest is, we submit, sufficient to permit TWA to raise the question in its petition for certiorari. See *Larson* v. *Valente*, 456 U.S. 228, 239 (1982); *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). It had no reason to urge it before the court of appeals altered its judgment on rehearing. *Bowen* v. *United States Postal Service*, 459 U.S. 212, 217-218 n.7 (1983).[2]

[2] It is also significant that both EEOC and the private plaintiffs, who clearly have an interest in this issue, support TWA's position on this question on the merits. Cf. *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U.S. 297, 304-305 (1983); *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 783-784 n.14 (1980).

The procedural posture of *Perini* is very similar to that here. The Director of the Office of Worker's Compensation Programs, U.S. Department of Labor, petitioned for review of the Second Circuit's decision that an injured employee of Perini was not entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* Perini challenged the Director's standing to raise the issue, asserting that he was not aggrieved by the court's ruling. However, this Court ruled that the presence of Churchill, the injured worker, as a party respondent and his filing of a brief in this Court urging reversal made the question of the Director's standing immaterial (459 U.S. at 304-305):

> The Director's petition, filed under 28 U.S.C. § 1254(1), brings Churchill before this Court, and there is no doubt that Churchill, as the injured employee, has a sufficient interest in this question to give him standing to urge our consideration of the merits of the Second Circuit decision.

Similarly, TWA's petition brought EEOC and the private plaintiffs before this Court as respondents, and these respondents have joined TWA in urging reversal of the Second Circuit's immunization of ALPA from monetary liability. Plain-

b. This is not a situation like *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981), in which, after the airline was found liable for discrimination against its female employees in *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C.), aff'd, 567 F.2d 429 (D.C. Cir. 1973), the airline commenced a separate action for contribution. Here, *plaintiffs* sued both the airline and the union and demonstrated that they were responsible for the discrimination charged (Pet. App. A32-A33; compare *Northwest Airlines*, 451 U.S. at 81, n.5). This Court in *Northwest Airlines* assumed "that the plaintiffs in the *Laffey* litigation could have recovered from either the union or the employer," 451 U.S. at 88, but found that assumption an insufficient basis for providing the airline with a separate cause of action for contribution in the absence of any statutory or federal common law provision for such a separate remedy. 451 U.S. at 90-99. In contrast, here TWA has not

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tiffs thus supply the requisite adversity to cure any standing problem. A "justiciable controversy is now before the Court." 459 U.S. at 305.

EEOC and the private plaintiffs are properly before this Court as respondents supporting petitioner on this issue; they may accordingly argue any issue comprehended within the questions presented by the petition in urging reversal of the judgment of the court of appeals. *Perini, supra*; *O'Bannon, supra*. There was accordingly no need for a cross-petition on this issue. In any event, the requirement of a cross-petition is a rule of practice and not jurisdictional. *Langnes* v. *Green*, 282 U.S. 531, 538 (1931); see *Bryant* v. *Technical Research Co.*, 654 F.2d 1337, 1341-1342 (9th Cir. 1981) (cross-appeal); *Kicklighter* v. *Nails by Jannee, Inc.*, 616 F.2d 734, 742-744 (5th Cir. 1980); *Arnold's Hofbrau, Inc.* v. *George Hyman Construction Co.*, 480 F.2d 1145, 1150 (D.C. Cir. 1973); see also 12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 400.05-5 (2d ed. 1982).

instituted a separate suit, or even sought to bring an additional party defendant into the original suit.[3]

2. Since we filed our opening brief, three courts of appeals have concluded that, as we submit (Gov't Br. 43-48), the remedies available under the ADEA are broader than those under the FLSA. These courts emphasize that the ADEA authorizes the district court to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of" the Act (29 U.S.C. 626(b)). *Whittlesey* v. *Union Carbide Corp.*, No. 1142 (2d Cir. Aug. 22, 1984), slip op. 5984-5985 (affirming the award of front pay under the ADEA where reinstatement is not feasible); *Davis* v. *Combustion Engineering, Inc.*, No. 82-5471 (6th Cir. Aug. 16, 1984), slip op. 11-12 (same); *Equal Employment Opportunity Commission* v. *Prudential Federal Savings & Loan Association*, No. 82-2444 (10th Cir. Aug. 7, 1984), slip op. 11-15 (same; contrasting narrower FLSA remedy).[4]

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[3] We suggested in our opposition to TWA's petition for certiorari that "the proper parties to seek further review of this issue would be respondents, the ones who were injured by ALPA's discriminatory conduct" (Br. in Opp. 19). That argument urged a prudential consideration against granting certiorari when those most directly affected by the decision below did not seek further review. It did not, however, suggest that, having decided to review the case, the Court would not have jurisdiction to review the issue, which is properly in this case.

[4] These cases also reaffirm their Circuits' rejection of the specific intent interpretation of the "wilfullness" requirement for liability for liquidated damages. *Davis*, slip op. 8-9; *Prudential*, slip op. 17-20; cf. *Whittlesey*, slip op. 5983 (violation not willful where "there was excusable uncertainty" over coverage of employees involved). See our opening brief (at 39).

For the foregoing reasons and those discussed in our principal brief, the judgment of the court of appeals should be reversed insofar as it holds ALPA not liable for damages and should be affirmed in all other respects.

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SEPTEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 10058